FILE COPY

NOV 14 1947

In the

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1947

No. 441

William F. Sternberg, individually and as co-Trustee under the Will of Herman J. Sternberg, deceased, and Louis E. Sternberg, Emma A. Walthers, Minnie S. Hilbrant, Edna Walthers, Harry Walthers, Theresa Bonnivier, Robert Hilbrant, Anna Mae Hilbrant, Lucile Hilbrant, Gilbert Hilbrant, Patricia Louise Sternberg and Lacie Ann Sternberg Mark

Petitioners

vs.

St. Louis Union Trust Company, personally and as co-Trustee under the Will of Herman J. Sternberg, deceased

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

S. Mayner Wallace
LaSalle Building
509 Olive Street
St. Louis 1, Missouri
Counsel for Petitioners

Index

	Page
Petition for a writ of certiorari	1-11
Outline	2
Summary and short statement	2
Jurisdictional statement	5
The questions presented	5
Reasons relied upon for the writ	6
Prayer for writ	10

Cases Cited

Anderson National Bank v. Luckett, 321 U. S. 233, 243	9
Crum v. Sawyer, 132 Ill. 443, 459, 24 N. E. 956	9
Gartside v. Gartside, 113 Mo. 348, 356-8, 20 S. W. 669	10
Graham v. Karr, 331 Mo. 1157, 1171, 55 S. W. 2d 995	9
May v. May, 167 U. S. 310, 320-321	10
Re 620 Church Street Building Corporation, 299 U. S. 24	5
Research Hospital v. Continental Bank, 352 Ill. 510, 521, 524, 186 N. E. 170, 174, 176	3
Sternberg v. St. Louis Union Trust Company, 394 Ill. 452, 68 N. E. 2d 899	3, 4
Sternberg v. St. Louis Union Trust Company, 66 F. Supp. 16—appeal dismissed, 158 F. 2d 386	4
Sunday School Union of etc. v. Walden, 6 Cir., 121 F. 2d 719, 724-5	10

Statutes Cited

Ill. R. S. 1945, chap. 3, pars. 197, 205	3
Rule 38, Sec. 5 (b) of this Court	2, 7, 10
Sec. 240, as amended, Judicial Code (28 USCA 347)	5
Sec. 262, Judicial Code (28 USCA 377)	5

In the

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1947

No. .....

William F. Sternberg, individually and as co-Trustee under the Will of Herman J. Sternberg, deceased, and Louis E. Sternberg, Emma A. Walthers, Minnie S. Hilbrant, Edna Walthers, Harry Walthers, Theresa Bonnivier, Robert Hilbrant, Anna Mae Hilbrant, Lucile Hilbrant, Gilbert Hilbrant, Patricia Louise Sternberg and Lacie Ann Sternberg Mark

Petitioners

vs.

St. Louis Union Trust Company, personally and as co-Trustee under the Will of Herman J. Sternberg, deceased

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable the Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Petitioners, William F. Sternberg, individually and as co-trustee under the Will of Herman J. Sternberg, deceased, and the other petitioners named in the caption,

respectfully petition for the Writ of Certiorari to review a judgment of the United States Circuit Court of Appeals for the Eighth Circuit in a cause therein numbered 13,479 wherein petitioners were appellants and St. Louis Union Trust Company, personally and as co-trustee under the Will of the said deceased, was appellee.

Outline.—This litigation concerns the estate of the said Sternberg. Jurisdiction below was because of diversity of citizenship.

The case is bottomed upon a corporate Missouri executor's tortious ancillary probate, in Illinois, of the decedent's Will; and that led to the petitioners' claim (denied below) for restitution, on account of the damages thereby suffered by them, and, also, to petitioners' claim (likewise denied below) for the removal from office of that executor as a co-trustee of a trust under the Will.

The prayed for WRIT is sought upon the ground that the Court of Appeals, in deciding this case, has, within the meaning of section 5 (b) of RULE 38 of this Court (in the particulars below specified) "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision"; and, also, the WRIT is sought upon the ground that the Court of Appeals has decided two important questions of local law in a way in conflict with applicable local decisions and also decisions of this Court and of the Circuit Court of Appeals for the Sixth Circuit.

Summary and Short Statement

Respondent, St. Louis Union Trust Company, domiciliary executor in Missouri of the estate of Herman J. Sternberg, deceased, petitioned for and secured, *ex parte*, a blanket or unqualified ancillary probate (embracing

realty as well as personalty) of that Will in Illinois (where respondent asserts the right to carry on a fiduciary business) *without disclosing* to the Probate Court of that State the all-important and well known fact that the deceased had married subsequent to the execution of his Will that was thereby revoked by statute (as he also intended) respecting his realty in Illinois.

Said conduct was in defiance of Ill. R. S. 1945, chap. 3, par. 197, reading:

> "Marriage by the testator shall be deemed a revocation of any existing Will executed by the testator prior to the date of the marriage."

It was respondent's legal duty to have advised the Probate Court of the subsequent marriage (*Research Hospital v. Continental Bank*, 352 Ill. 510, 521, 524, 186 N. E. 170, 174, 176, & *ca. ci.*) and, had respondent done so, probate of the Will would have been limited to the personalty of the deceased (*Sternberg v. St. Louis Union Trust Company*, 394 Ill. 452, 68 N. E. 2d 899 & *ca. ci.*).

Petitioners, being all of the heirs at law of the deceased and also all of the beneficiaries under his Will, were previously solicited by respondent (acting also as their testamentary co-trustee) to give respondent their waivers of notice of the hearing for said probate; and said waivers were thus given upon the assumption that same would be lawfully used—that is, to probate the Will covering the personalty, but not the realty, of the deceased in Illinois.

Said probate operated, under Ill. R. S. 1945, chap. 3, par. 205, "to transfer" the title to said realty, from the petitioning heirs, to the respondent as testamentary co-trustee. (Parenthetically, that probate would have been impervious to any successful attack after the lapse of nine months.)

Petitioners, after expensive litigation with respondent in Illinois and in Missouri, recaptured the title to their said inherited lands and recovered from respondent a large sum of money in coal royalties theretofore wrongfully collected therefrom by the respondent (*Sternberg v. St. Louis Union Trust Company,* 394 Ill. 452, 68 N. E. 2d 899, and *Sternberg v. St. Louis Union Trust Company,* 66 F. Supp. 16 and R. 75-86, 361—appeal dismissed, 158 F. 2d 386).

Petitioners pleaded below that respondent's conduct, in wrongfully probating the Will in Illinois, constituted a tortious use by respondent of its status as executor and co-trustee; and they prayed for restitution from respondent in its individual capacity for the very substantial damages they had suffered in, among other respects, prosecuting said litigation that was defended by frivolous and harassing defenses, set up by the respondent, and all of which were adjudged to be without substance as appears from the above citations.

Petitioners also prayed for the removal of the respondent, as their testamentary co-trustee, because of the said probate fraud and because of incompetence and maladministration as exhibited by respondent's said defenses and by certain other matters of lesser importance, and, further, they prayed for said removal because of strained relations, between the two co-trustees, detrimental to the future of the trust.

Respondent's defense, respecting said statute of Illinois, was that it (the respondent) had *overlooked* and, at the time of the ancillary probate, *was unaware* of that statute; and such a defense now stands sanctioned by the Court of Appeals.

The judgment of the District Court, that awarded petitioners the amount of the royalties for which they also

sued, denied restitution from, and the removal of, the respondent.

The Court of Appeals affirmed in an opinion, by RIDDICK, J., that (first) wrongly and unauthorizedly assumed that petitioners were as much responsible for the wrongful probate as was the respondent and that (secondly) refused to be governed by the admitted fact that respondent's Illinois attorneys (who acted as its agents in probating the Will) not only knew at the time of the said invalidating statute and of the subsequent marriage but actually warned respondent of the consequences of an unqualified probate covering the said lands.

The opinion of the Court of Appeals thereupon affirmed the judgment of the District Court.

Jurisdictional Statement

The opinion and judgment of the Court of Appeals were rendered and entered August 26, 1947 (R., addn'l, pps. 4 and 16) and a timely petition for rehearing was entertained and denied on October 7, 1947 (R., addn'l pps. 17 and 33).

The basis upon which it is contended that this Court has jurisdiction to review said judgment on certiorari is section 240 (as amended) of the Judicial Code (28 USCA 347) and the "all writs" section 262 of the Judicial Code (28 USCA 377) as construed and applied in *Re 620 Church Street Building Corporation*, 299 U. S. 24.

The Questions Presented

This application for certiorari presents the questions:

1. Whether a Circuit Court of Appeals may rightly decide a case upon the basis of a determinative state of fact expressly assumed by the Court to be true but in

fact non-existent and wholly unwarranted by the record?

2. Whether such Court may, in deciding a case, disregard a vital fact, admitted by the parties and expressly exhibited by the record, and proceed to decision upon the basis that such fact is non-existent?

3. Is respondent, as an executor incorporated and doing business in Missouri, and claiming also to be duly authorized to do, and also doing, a fiduciary business in Illinois, immune from the pecuniary consequences of its tort committed in the latter State because of the fact that, as claimed by the executor, it was ignorant of a governing statute, of that State, violated by said executor?; and

4. Is respondent, as co-trustee of a testamentary trust, liable to removal as such by the District Court because of said wrongful probate and/or because of the strained relations, growing out of the said probate and the litigation that followed, for which respondent is solely responsible, existing between it and its said co-trustee and all of its beneficiaries, to the injury of the trust?

Reasons Relied upon for the Writ

1

The Court of Appeals referring to the ancillary Illinois probate (in March of 1944) ruled (R., addn'l p. 6) that:

> "At the beginning of the administration of Sternberg's estate all parties in interest acted upon the assumption that Sternberg's will was valid under Illinois law as it was under Missouri law."

And the Court also ruled that, *because of the said "assumption"*, the respondent failed to advise the Probate Court in Illinois of Sternberg's subsequent marriage (R., addn'l p. 6).

All of the foregoing is wholly without the support of this record.

No such contentions were ever made by or for the respondent.

And those rulings are vital to the disposition of the merits of this litigation because, among other things, by said view of the Court of Appeals, the petitioners are made to share with respondent the responsibility for said wrongful *ex parte* probate.

It was not until July of 1944 (R. 140) that the petitioners (then yet unaware of their rights under the law) first acted, in anywise, upon such an assumption.

Several months thereafter, when they were first advised of their rights, they instituted their litigation, in Illinois, against the respondent.

Prior to said month of July, there was nothing whatever for the petitioners themselves to have done—and there is nothing that they did, in fact, do.

This matter is further elaborated in petitioners' petition for a rehearing below (R., addn'l pps. 19-21).

In other words, the Court of Appeals has decided this case upon the basis of a factitious state of fact.

Therefore, petitioners respectfully submit that, within the meaning of RULE 38, the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision".

2

The Court of Appeals also ruled that the respondent *first learned* of the said Illinois statute after the Will had been probated by respondent there (R., addn'l p. 7).

But, admittedly, respondent's Illinois agent-attorneys, who probated the Will pursuant to respondent's express direction, at all times knew of said statute and of the testator's subsequent marriage and even raised the question of the invalidity of the probate as respected the Illinois lands (R. 226, 231).

Said ruling of the Court of Appeals is, therefore, vitally erroneous in this aspect also.

The knowledge of said agent-attorneys is not even mentioned in the opinion; and was unsuccessfully re-urged by petitioners in their petition for a rehearing (R., addn'l p. 22).

In other words, the Court of Appeals erroneously disregarded a vital fact determinative of the case.

Therefore, petitioners respectfully further submit that the Court of Appeals, within the meaning of RULE 38, "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision".

3

This corporate respondent may not even be heard to defend upon the ground that it was unaware of a controlling statute of another State wherein it claims the right to do, and is doing, a fiduciary business.

Respondent is, of course, held to a knowledge of the same.

Said ruling (R., addn'l p. 7) of the Court of Appeals, to the contrary, is in conflict with the law not only of Illinois and Missouri but also of this Court. For example:

> Crum v. Sawyer, 132 Ill. 443, 459, 24 N. E. 956
> Graham v. Karr, 331 Mo. 1157, 1171, 55 S. W. 2d 995
> Anderson National Bank v. Luckett, 321 U. S. 233, 243

Therefore, petitioners respectfully submit that, within the meaning of RULE 38, the Court of Appeals has decided an important question of local law in a way in conflict with applicable local and federal decisions.

4

The Court of Appeals ruled (R., addn'l p. 15) that the strained relations (responsibility for which rests upon the respondent) between the two co-trustees and between respondent and all of its beneficiaries, growing out of the said probate and ensuing litigation, was not such "hostility" as required, in the interests of the trust, the removal of respondent as a co-trustee of the trust.

But, even ill-feeling, growing out of respondent's wrongful conduct, that exists between these parties, as demonstrated by this record, has already been adjudged to require such removal.

As has been ruled by this Court:

> "The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised whenever such a state of mutual ill-feeling, growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust,

> even if for no other reason than that human infirmity would prevent the cotrustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated."
>
> May v. May, 167 U. S. 310, 320-321

And, quoting from a recent case in the Sixth Circuit:

> "The presence of friction resulting in litigation and bad feeling even in a case where the trustee's integrity and intelligence of management is above reproach requires removal of the trustee."
>
> Sunday School Union of etc. v. Walden, 6 Cir., 121 F. 2d 719, 724-5

The law of Missouri is in accord:

> Gartside v. Gartside, 113 Mo. 348, 356-8, 20 S. W. 669

Therefore, it is further respectfully submitted that, under RULE 38, the Court of Appeals has decided an important question of local law in conflict with Federal, as well as State, decisions.

* * *

For the reasons aforesaid, petitioners respectfully submit that the judgment of the Court of Appeals, denying petitioners' restitutionary claim for damages and the removal of the respondent as their co-trustee, is invalid as a final disposition of petitioners' claims, and is also erroneous as respects those claims, that now stand denied for the want of due process, or because of deviation from the judicial way, and on account of the errors aforesaid.

WHEREFORE, petitioners pray that a WRIT of Certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in the cause of *"William F. Sternberg, individually and as co-*

trustee under the Will of Herman J. Sternberg, deceased, et al., appellants, vs. St. Louis Union Trust Company, personally and as co-trustee under the Will of Herman J. Sternberg, deceased, appellee," No. 13,479, and that said judgment be vacated or reversed; and, further, petitioners pray for all other proper relief to which they may appear to this Honorable Court to be entitled.

Respectfully Submitted

S. Mayner Wallace
LaSalle Building
509 Olive Street
St. Louis 1, Missouri
Counsel for Petitioners

St. Louis, Mo.
Nov. 1947